Supreme Court, U.S.
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No. 98-502

In The

Supreme Court of the United States

October Term, 1998

SOL SLOTNIK and DIANE REVERAND,

Petitioners,

vs.

VICTORIA DOWLING CONSIDINE
and THE SECOND INJURY FUND,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

BRIEF IN OPPOSITION FOR RESPONDENT VICTORIA DOWLING CONSIDINE

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INTRODUCTION

This case involves a challenge to an award of benefits under Connecticut's Workers' Compensation Act (hereinafter "WCA"). Interpreting state statutory provisions, a Connecticut workers' compensation commissioner concluded that the state legislature intended its WCA to be open to all covered employees injured on the job, regardless of their citizenship or immigration status. This decision was affirmed at each stage of review, including the Connecticut Supreme Court, Connecticut's highest state court.

The *pro se* Petitioners have requested the Court to review this decision, effectively seeking plenary review of an issue of state law. Additionally, they did not properly raise the issue below. Finally, the Petitioners do not identify a single conflicting decision holding that a state's decision to permit undocumented aliens the remedy of workers' compensation is preempted by federal law.

Because the Petitioners seek certiorari on a splitless question not properly raised below, and on a matter correctly decided by the Connecticut Supreme Court, the Respondent respectfully requests that the Court deny the instant petition.

STATEMENT OF THE CASE

On February 28, 1994, Respondent Victoria Dowling Considine slipped and fell on an icy driveway and sustained serious and disabling injuries arising out of and in the course of her employment. These injuries have rendered her totally incapacitated and medically unable to work, continuing to the present time. At the time of her injury, she was employed as a live-in housekeeper and nanny by the *pro se* Petitioners.

The Petitioners had also represented to Ms. Considine that she would be provided with health insurance, and withheld money from her pay under the representation that it was being applied to health insurance premiums, however they never obtained health insurance for Ms. Considine. At the time of her employment, Ms. Considine, a native of England, was an undocumented alien due to the fact that her work authorization had expired, a status the Petitioners were fully aware of before hiring her. Subsequent to her injuries, the Respondent married a United States citizen, and as of August 7, 1996, has been lawfully present in the United States and legally available for work.

The Respondent sought compensation from the Petitioners pursuant to Connecticut's WCA, Connecticut General Statutes § 31-275 *et seq.* The *pro se* Petitioners vigorously contested paying any benefits to the Respondent, arguing that she was not properly considered an employee under the WCA due to her undocumented status[1].

This argument was considered and rejected by the trial commissioner, the Compensation Review Board, and the Connecticut Supreme Court. At no time below did the Petitioners claim that the Respondent's immigration status only prohibited the receipt of wage related compensation. Additionally, the Petitioners never even cited to the Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), until after oral argument before the Connecticut Supreme Court. When the Respondent sought a transfer to the Connecticut Supreme Court from the Appellate Court, the Petitioners

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1. The Petitioners also raised various state law arguments which are not addressed here as they do not relate to the question presented or jurisdiction of the Court.

objected, claiming this matter was not serious enough to require the Connecticut Supreme Court to review the case[2].

REASONS FOR DENYING THE WRIT

I.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE IT SEEKS PLENARY REVIEW OF A QUESTION OF STATE LAW OVER WHICH THE COURT HAS NO JURISDICTION.

The Petitioners ask the Court to review the decision of the Connecticut Supreme Court holding that undocumented aliens are properly considered employees under Connecticut's Workers' Compensation Act. Although the Petitioners cite to 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction, the petition itself contains no analysis of how the question presented triggers the jurisdiction of the Court.

The only potentially applicable clause of 28 U.S.C. § 1257(a) is as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

Therefore, the Court is jurisdictionally limited to deciding whether the application of Connecticut's Worker's

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2. Pursuant to Connecticut's Rules of Appellate Procedure § 65-1 and § 65-2, the Connecticut Supreme Court has the discretion to transfer a case to itself from the Appellate Court.

Compensation Act (hereinafter "WCA") to include undocumented aliens is "repugnant to the Constitution, treaties, or laws of the United States." *Id.* In the context of this case, the only available legal theory under which the Court could review the Connecticut Supreme Court's decision is one of express or implied preemption by the federal immigration laws, specifically the Immigration Reform and Control Act of 1986 (hereinafter "IRCA").

The question presented by Petitioners, and their reasons for granting the writ, do not raise an issue of preemption, but rather seek plenary review from the Court as to whether the Connecticut Supreme Court correctly interpreted Connecticut's Worker's Compensation Act in light of the policies behind the IRCA. This is beyond the jurisdiction of the Court. Even the lone dissenting opinion by Justice McDonald of the Connecticut Supreme Court did not suggest that the majority's interpretation of the WCA presented a preemption problem, but merely concluded that as a question of policy the State of Connecticut should not include undocumented aliens within the scope of the WCA. *Dowling v. Slotnick*, 244 Conn. 781, 819-821, 712 A.2d 396 (1998).

> States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.

DeCanas v. Bica, 424 U.S. 351, 356 (1976) (holding that California statute which affected employment of illegal aliens was not preempted by the Immigration and Nationalization Act).

To the extent that the issue of preemption may be considered a "subsidiary question fairly included" within the question presented pursuant to Sup. Ct. R. 14(a), it is not deserving of review by the Court. Firstly, the Petitioners fail to even use the word *preemption*, or cite to the Supremacy Clause of the Federal Constitution, a single time in their question presented or reasons for granting the writ. The Supremacy Clause of the Federal Constitution is not even listed in the Petitioners' table of authorities. These facts alone speak volumes on whether they have a valid preemption claim.

Additionally, there is no split of authority on this issue. The Court has made clear that a guiding consideration for review of a case is the existence of a conflict between a decision of a state court of last resort and another state court of last resort or of a United States Court of Appeals on an important federal question. Sup. Ct. R. 10(b). In the present case, the Petitioners do not cite, and the Respondent has been unable to locate, a single case from any jurisdiction suggesting that a state's considering undocumented aliens to be within the scope of its worker's compensation laws is preempted by federal law.

Every one of the cases that the Petitioners cite as allegedly conflicting with the decision below involve the proper interpretation of a federal labor statute in light of the IRCA, in which the question was whether Congress intended to allow undocumented workers to enjoy remedial benefits under a particular federal law. None of them involved, as this case does, the question whether, under the Supremacy Clause, IRCA prohibits a state from choosing to permit undocumented workers to obtain a remedy under the state's law. Thus, none of these cases ever touched upon the strong presumption against preemption of state law which the Court consistently applies. Therefore, there is no conflict between either the holdings or reasoning of any of the cases cited by the Petitioners and this case.

As a general rule, "consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 223-24 (1993). "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996).

Petitioners have provided no analysis as to why the application of a state's worker's compensation law should be deemed preempted by the federal immigrations laws, for the simple reason that no viable argument is available. Instead, they request the Court to use the generalized concept of undocumented aliens to address issues which are simply not presented in the actual case or controversy before the Court.

Additionally, "the purpose of Congress is the touchstone in every pre-emption case." *Id.* The result the Petitioners argue for would expressly contradict the intent of Congress in enacting the IRCA. The House Judiciary Committee expressly stated that "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law." House Judiciary Report on the IRCA, H.R. Rep. No. 682(I), 99 Cong. 2d Sess. 58 (1986), U.S. Code Cong. & Admin. News 1986, pp. 5649, 5662. The House Committee on Education and Labor also explained that "the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies." House Committee on Education and Labor Report on the IRCA, H.R. Rep. No. 99-682(II), 99 Cong. 2d Sess. 58 (1986), U.S. Code Cong. & Admin. News 1986, p. 5758. These expressions of legislative understanding clearly demonstrate that Congress did not intend to undermine or diminish a state labor protection such as workers' compensation.

Therefore, the petition for writ of certiorari should be denied.

II.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON IN THE COURTS AND ADMINISTRATIVE AGENCIES BELOW.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-497 (1981). Although later cases have questioned whether this rule is truly jurisdictional as opposed to a prudential restriction, it is clear that

> "at the minimum, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law."

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) (quoting *Webb, supra*).

The question presented by the Petitioners is whether the payment of wage related benefits to an injured employee under a state workers' compensation act conflicts with the policies of IRCA and the Court's decision in *Sure-Tan, Inc. v. NLRB*,

467 U.S. 883 (1984). This issue was never properly raised below. In all of the proceedings below, Petitioners claimed that the Respondent was not an employee under the terms of the workers' compensation act, and therefore was entitled to *no* benefits since, they claimed, the workers' compensation commission had no jurisdiction.

The Petitioner's argument to this Court is premised entirely upon *Sure-Tan*, however their principal brief to the court below did not ever mention this case. In fact, it was the Respondent who relied upon *Sure-Tan* since the actual issue being litigated was whether the Respondent was properly considered an employee under the state's worker's compensation act. The Petitioners' first mention of *Sure-Tan* was in a supplemental reply letter submitted after oral argument before the Connecticut Supreme Court. "It is a well established principle, however, that arguments cannot be raised for the first time in a reply brief." *Saturn Construction Co. v. Premier Roofing Co.*, 238 Conn. 293, 312, n.14, 680 A.2d 1274, 1284 (1996).

This claim was clearly not properly raised below as the Respondents and tribunals were not "apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Bankers Life & Casualty Co.*, *supra*, 486 U.S. at 77-78. The Petitioners' attempt to change the issue to solely one of wages for the first time before this Court is entirely improper, and unfair both to the Respondent and to the State of Connecticut.

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based upon federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Webb, *supra*, 451 U.S. at 499.

Connecticut's Worker's Compensation Act does not solely provide wage related benefits. One of the most significant benefits is the payment of all medical expenses reasonably related to the injury. Connecticut General Statutes § 31-294d. Additionally, an employee such as the Respondent who suffers a permanent disability is entitled to a specific award for the permanent injury. Connecticut General Statutes § 31-308. "Specific benefits are benefits for the loss or loss of the use of specific body parts." *Levanti v. Dow Chemical Co.*, 218 Conn. 9, 13, 587 A.2d 1023 (1991). "In fact, permanent partial schedule awards are based upon medical condition after maximum improvement has been reached and ignore wage loss entirely." *Id.*

At all times below, Petitioners have taken the position that the Respondent was not an employee under Connecticut's Worker's Compensation Act and therefore entitled to no benefits. The question presented is an entirely different issue which was never ruled upon in any of the proceedings below for the simple reason that it was not raised.

The Petitioners newly raised issue is a patent attempt to bootstrap themselves into a circuit conflict even though none exists as to the actual issues raised and decided in this case. Therefore, the petition for writ of certiorari should be denied.

III.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTIONS, AND THERE ARE NO CONFLICTS AMONG THE STATES OR FEDERAL COURTS OVER WHETHER UNDOCUMENTED ALIENS MAY RECEIVE STATE WORKER'S COMPENSATION BENEFITS.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The "decision to grant certiorari represents a commitment of scarce judicial resources." *City of Oklahoma v. Tuttle*, 471 U.S. 808, 815-16 (1985). The present case is simply a decision of a state court that state law permits the state remedy of worker's compensation to an injured state resident.

As discussed above, there is no conflict of authority on the issues actually raised in this case. The decisions which the Respondent has located have been unanimous that "illegal entry into this country does not deprive an alien of his compensation rights." Larson, *Workers' Compensation*, § 35.20 (Matthew Bender & Co., Inc., New York, 1997). *See Rivera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991); *Testa v. Sorrento Restaurant, Inc.*, 197 N.Y.S. 2d 560 (N.Y. App. 1960); *Cenvill Development Corp. v. Candelo*, 478 So. 2d 1168 (Fla. App. 1985); *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701 (Fla. App. 1982); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W. 2d 635 (Tex. App. 1972); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. App. 1996); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. App. 1996); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. App. 1996); *Villa v. Eastern Wire Products Co.*, 554 A.2d 644 (R.I. 1989); 82 Am. Jur. 2d, Workers' Compensation § 146.

The Petitioners have failed to cite a single case where any court denied the right of an undocumented alien to receive benefits under a state worker's compensation statute for any reason, let alone a reason amounting to an "important federal question." Sup. Ct. R. 10(b).

In an attempt to persuade the Court to review the case, the Petitioners invite the Court to create a "bright line standard" for the rights of undocumented aliens in all cases, regardless of the source of the claimed right. Petition at 21. This goes far beyond the proper function of the Court. "According to the express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies.' " *Mistretta v. United States*, 488 U.S. 361, 385 (1989). In implementing this limited grant of power, the Court has "refused to issue advisory opinions." *Id.*

The Petitioners' reliance upon *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), is clearly misplaced. In *Sure-Tan*, the Court held that undocumented workers were properly considered employees under the NLRA. *Id.* at 891-894. The Court reasoned, as did the Connecticut Supreme Court in the present case, that since the legislature did not exclude undocumented aliens from the definition of *employee*, the Court should not modify the definition itself. *Id.* at 891-892. The Court also expressed the same policy furthered by including undocumented aliens in the definition of employee which was noted by the Connecticut Supreme Court and every other court cited above which has passed upon the issue,

> to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.

Sure-Tan, 467 U.S. at 893.

The Court also held that the court of appeals improperly awarded back pay and reinstatement to the undocumented aliens under the specific facts of that case. *Id.* at 898-905. However, this decision encompassed a careful interpretation and balancing of the respective statutory language and policies of the INA and NLRA.

The question presented by the Petitioner appears to misconstrue the proper role of the Court in this regard. In interpreting Title VII, the NLRA, or the FLSA, the Court is jurisdictionally entitled to engage in ordinary statutory construction and is entitled to plenary review of the proper interpretation. In interpreting state or local laws, the Court is jurisdictionally limited to analyzing whether the law is preempted by federal law.

The Petitioners' invitation for the Court to use a case about state workers' compensation benefits as a springboard for precluding relief to undocumented aliens under all federal, state, and local laws relating to wage related benefits quite simply goes too far. The Court is not in the business of issuing sweeping advisory opinions, and the careful analysis and balancing which is required to properly decide the interplay between the immigration laws and other federal, state or local laws is entirely unsuited for the type of judicial legislation which the Petitioners seek.

The facts and law pertinent to this case highlight the problems inherent in the type of law the Petitioners are asking the Court to create. The Petitioners essentially claim that the Respondent should not be entitled to wage related compensation for the period of time she was medically unable to work and was also undocumented. However, Connecticut's Worker's Compensation Act is intended to provide compensation for injuries arising out of and in the course of employment which

render a person physically unable to work. *Dowling v. Slotnick*, 244 Conn. 781, 799, 712 A.2d 396 (1998). There is no requirement that they be otherwise legally able to work for the particular employer.

> If the claimant is totally disabled, as the trial commissioner found her to be, she is by definition unable to work in any capacity based upon her medical condition. See Connecticut General Statutes § 31-307. Thus, whether she is an illegal alien or not, she simply cannot work.

Compensation Review Board Opinion dated February 5, 1997, p. 60a of Petitioner's Appendix. If the Respondent had not been injured, she would have been legally able to work in England, Canada, or numerous other countries and territories throughout the world. Therefore, she suffered a loss to which she is entitled to compensation under Connecticut law, which is in no way "repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a).

This is in marked contrast with the federal statutes, not raised in this case, which the Petitioners seek to amalgamate for purposes of a "bright line standard." These statutes generally seek to compensate a person for damages suffered by not obtaining the benefits they otherwise would have received from a specific employer had that employer not engaged in the prohibited conduct.

Even under the federal statutes, it seems a distinction would be drawn as between employers who also operated in countries the employee could legally work in, or employers for whom an employee could obtain work authorization if they obtained work from the employer. There are numerous other hypotheticals which could be constructed, the point is simply that the Court

should not engage in sweeping judicial legislation which would significantly impact countless persons not before the Court on issues not even relevant to this case.

Article I, § 8 of the Constitution delegates the authority to Congress to determine whether a "bright line standard" should be established as to whether undocumented aliens are entitled to wage related benefits under various federal, state, and local laws. The Congress has not done so, and the Court should decline the Petitioners' invitation to rely upon penumbral emanations from the assumed policies of various statutes, not constitutional in nature, to create a sweeping rule that the legislature has declined to enact. It is also debatable whether the Congress could validly force a state worker's compensation commission to effectively act as an enforcement wing of the INS. *See Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

The *pro se* certiorari petition should be denied because it seeks plenary review of a question of state law over which the Court has no jurisdiction. The certiorari petition should also be denied because the question presented was not pressed or passed upon below. Finally, the certiorari petition should be denied because it does not present any important federal questions, and there are no conflicts among the states or federal courts over whether undocumented aliens may receive state worker's compensation benefits.

Respectfully submitted,

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